No. 97-1999

In The

Supreme Court of the United States

October Term, 1997

FIREMAN'S FUND INSURANCE COMPANY,

Petitioner,

v.

M.V. DSR ATLANTIC, her engines, tackle, machinery, etc., in rem; CHO YANG SHIPPING COMPANY, Ltd. a corporation,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

MICHAEL F. STURLEY
Counsel of Record
727 East Dean Keeton Street
Austin, Texas 78705
(512) 232-1350

JAMES J. TAMULSKI
KAYE, ROSE & PARTNERS, LLP
One California Street, Suite 2230
San Francisco, California 94111
(415) 433-6555

WILLIAM M. DUNCAN
216 Hilt Road
Hornbrook, California 96044
(530) 475-0170

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

For over a quarter-century, this Court has consistently recognized a general rule favoring the enforcement of forum selection clauses. Three years ago, in *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995), the Court held that this general rule applies in the bill of lading context. Does the unavailability of an *in rem* procedure in a foreign jurisdiction defeat this general rule?

RULE 29.6 STATEMENT

The Motor Vessel DSR Atlantic was owned by DSR-Senator Lines at the time that petitioner threatened to arrest it. DSR-Senator Lines' parent company is Hanjin Shipping. DSR-Senator Lines has no nonwholly owned subsidiaries.

DSR-Senator Lines was, at the relevant time, a member of the United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Limited, a mutual insurance association (known as a "P & I Club") whose members are shipowners from around the world. The Club has neither parent companies nor nonwholly owned subsidiaries. The United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Limited would be liable for any final judgment in this action against either M.V. DSR Atlantic or DSR-Senator Lines.

Cho Yang Shipping Company's parent companies are:

Krota Sea-Land Transportation Ltd.
Nambuk Fisheries Co., Ltd.
Pieris Investments PTE, Ltd.

Cho Yang Shipping Company's nonwholly owned subsidiaries are:

Chang Won Development Co., Ltd.
Cho Yang (America), Inc.
Cho Yang (Cyprus) Shipping Ltd.
Dong Young Shipping Co., Ltd.
First Building Management Co., Ltd.
First Life Insurance Co., Ltd.
Hanshim Mutual Savings & Finance Co.
Jinju Ham Co., Ltd.

RULE 29.6 STATEMENT – Continued

Nambuk Fisheries Co., Ltd.
Samik Express Co., Ltd.

Cho Yang Shipping Company is a member of the Steamship Mutual Underwriting Association (Bermuda) Limited, another P & I Club whose members are shipowners from around the world. This Club also has neither parent companies nor nonwholly owned subsidiaries.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

RULE 29.6 STATEMENT ii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vi

INTRODUCTION 1

REASONS FOR DENYING THE WRIT 2

I. THIS COURT'S REVIEW OF THE QUESTION PRESENTED WOULD BE PREMATURE AT THIS TIME 3

A. THERE IS NO CONFLICT AMONG THE LOWER COURTS ON THIS ISSUE 3

B. ONLY ONE OTHER APPELLATE COURT HAS ADDRESSED THE PROPER SCOPE OF *SKY REEFER* 5

C. CONGRESS IS CURRENTLY CONSIDERING LEGISLATION THAT WOULD, WITH RESPECT TO FUTURE CASES, RESOLVE THE QUESTION PRESENTED 7

II. THE COURT OF APPEALS CORRECTLY CONSTRUED SECTION 3(8) OF THE CARRIAGE OF GOODS BY SEA ACT AND PROPERLY APPLIED THIS COURT'S DECISION IN *SKY REEFER* 9

A. THE *IN REM* PROCEDURE IS A PROCEDURAL REMEDY THAT IS OUTSIDE THE SCOPE OF SECTION 3(8) 9

TABLE OF CONTENTS – Continued

Page

B. THE PETITIONER'S INTERPRETATION OF SECTION 3(8) WOULD EVISCERATE THIS COURT'S DECISION IN *SKY REEFER* 12

CONCLUSION 13

TABLE OF AUTHORITIES

Page

CASES:

The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972) 1, 9, 12

California v. Deep Sea Research, Inc., 118 S. Ct. 1464 (1998) 11

Carnival Cruise Lines v. Shute, 499 U.S. 585 (1991) 1, 9, 12

Dempsey & Associates v. S.S. Sea Star, 461 F.2d 1009 (CA2 1972) 5

Dods Shipping Ltd. v. Karobi Lumber Co., 397 F.2d 570 (CA5 1968) 5

Hyundai Corp. U.S.A. v. M/V An Long Jiang, 1998 AMC 854 (S.D.N.Y. 1998) 4

Indussa Corp. v. S.S. Ranborg, 377 F.2d 200 (2d Cir. 1967) (en banc) 1

International Marine Underwriters CU v. M/V Kasif Kalkavan, 989 F. Supp. 498 (S.D.N.Y. 1998) 4

Itel Container Corp. v. M/V Titan Scan, 139 F.3d 1450 (CA11 1998) 6

The Kensington, 183 U.S. 263 (1902) 4

The Keokuk, 76 U.S. 517 (1869) 5

Knott v. Botany Mills, 179 U.S. 69 (1900) 4

Krauss Bros. Lumber Co. v. Dimon S.S. Corp., 290 U.S. 117 (1933) 5

Mitsui & Co. (USA) Inc. v. Mira M/V, 111 F.3d 33 (CA5 1997) (per curiam) 6

TABLE OF AUTHORITIES – Continued

Page

Republic of India v. India Steamship Co. (No. 2), [1997] 3 W.L.R. 818 (H.L.) (U.K.) 11

The St. Lawrence, 66 U.S. (1 Black) 522 (1861) 11

Steel Warehouse Co. v. Abalone Shipping Ltd., 141 F.3d 234 (CA5 1998) 6

Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528 (1995) ..... *passim*

STATUTES AND RULES:

Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. app. §§ 1300-1315 ..... *passim*

COGSA § 3(8), 46 U.S.C. app. § 1303(8) .. 1, 7, 8, 9, 11, 12

COGSA § 4(2)(q), 46 U.S.C. app. § 1304(2)(q) 10

FED. R. CIV. P. Supp. Rule C 11

OTHER AUTHORITIES:

GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY (2d ed. 1975) 9, 10, 12

Maritime Law Association of the United States ("MLA") doc. no. 724 (May 3, 1996) 7

Robert Mottley, *Revised COGSA on Senate Track*, American Shipper, June 1998 8

Tim Sansbury, *Senator Vows Change to Liability Law Covering Cargo Damaged or Lost at Sea*, The Journal of Commerce, Apr. 23, 1998, at 1 8

Michael F. Sturley, *Proposed Amendments to the Carriage of Goods by Sea Act*, 18 Hous. J. Int'l L. 609 (1996) 7

INTRODUCTION

The real issue in this case is the continued validity of this Court's decision in *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995). Prior to *Sky Reefer*, the courts of appeals held that forum selection clauses in bills of lading are invalid under section 3(8) of the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. app. § 1303(8), which prohibits a carrier from lessening its liability for cargo loss or damage except as permitted in the Act. *See, e.g., Indussa Corp. v. S.S. Ranborg*, 377 F.2d 200 (2d Cir. 1967) (en banc). In *Sky Reefer*, this Court, rejecting the *Indussa* reasoning, held that section 3(8) applies only when a carrier seeks to lessen its substantive liability. 515 U.S. at 534-35. It does not apply to the procedures – such as the selection of a forum – that are available to enforce the carrier's substantive liability. *Ibid.* Thus even bill of lading cases governed by COGSA are subject to the general rule favoring the enforcement of forum selection clauses that this Court first announced in *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), and reaffirmed in *Carnival Cruise Lines v. Shute*, 499 U.S. 585 (1991).

The availability of *in rem* procedures in the United States is completely irrelevant here except to the extent that petitioner can use their nonavailability in Korea (due to Korea's nonrecognition of a maritime lien in this context) as a justification for avoiding the forum selection clause in the bill of lading. If this Court were to reverse the decision below and order the case to go forward in the district court, petitioner would derive no further benefit whatsoever from the U.S. *in rem* procedures. Contrary to petitioner's assertion, *see* Petition for Writ of Certiorari ("Pet.") at 3 ¶ 3, the ship's insurers would be liable "[i]n

the event that a final decree, after appeal, if any, be entered . . . against DSR Atlantic *or her owners* [DSR-Senator Lines]," *see* Excerpts of Record ("ER") at 70 ¶ 2 (emphasis added). In any event, the *in personam* liability of respondent Cho Yang (which is also backed by adequate insurance) is more than sufficient to satisfy any judgment that petitioner might obtain.

Petitioner's real concern here is the same as the cargo claimant's concern in *Sky Reefer*. Having begun the action in the United States in violation of the forum selection clause, it does not want to face the expense and inconvenience of bringing its action in a foreign forum. *See* 515 U.S. at 535-36. Thus petitioner argues that public policy requires the U.S. courts to retain jurisdiction. But this dispute is between the experienced and sophisticated U.S. subsidiary of a German insurance company and two foreign carriers (German and Korean), whose liability, if any, will be borne by multinational insurers based in England; it involves damage suffered either in France or the mid-Atlantic. Although the U.S. courts might be an appropriate forum for this dispute (in the absence of a forum-selection clause), no public policy requires it to be heard in the United States.

REASONS FOR DENYING THE WRIT

If there were a clear conflict among the courts of appeals on an important issue regarding the enforceability of forum selection clauses in bills of lading, and if no other method were realistically available to resolve the conflict, it might be appropriate for this Court to address

the issue in a case that directly raises the question presented. At the moment, however, there is no conflict in the lower courts of any kind. Indeed, this is the first case explicitly to address the question presented, and the only appellate case to do so. Furthermore, Congress is already considering the subject, so any ruling by this Court would likely be of limited importance. Under the current COGSA, the decision below is nothing more than a routine (and correct) application of *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995). It does not warrant further review.

I. THIS COURT'S REVIEW OF THE QUESTION PRESENTED WOULD BE PREMATURE AT THIS TIME

In view of this Court's limited resources, certiorari should be granted only in cases that require the Court's immediate attention. When there is no conflict among the lower courts, when the lower courts have barely addressed the issues involved, and when Congress is already considering proposed legislation that would resolve the question presented, then review by this Court would be premature.

A. THERE IS NO CONFLICT AMONG THE LOWER COURTS ON THIS ISSUE

Petitioner does not even claim an inter-circuit conflict on the real issue presented by this case, *i.e.*, whether the unavailability of an *in rem* procedure in a foreign jurisdiction defeats a bill of lading's forum selection clause requiring disputes to be resolved in that jurisdiction. *See*

Pet. at 16 ("[n]either the Second or Fifth Circuit has considered the specific issue"). Petitioner asserts that "[a]t the district court level, conflicting decisions are already proliferating." Pet. at 7. But in fact the only district court to agree with petitioner's analysis did so in dicta. *See International Marine Underwriters CU v. M/V Kasif Kalkavan*, 989 F. Supp. 498 (S.D.N.Y. 1998) (enforcing a Korean forum selection clause in an *in personam* action, while suggesting that the clause would have been unenforceable in an *in rem* action). Furthermore, a subsequent decision in the same district rejected the argument that petitioner makes here and explicitly agreed with the decision below. *See Hyundai Corp. U.S.A. v. M/V An Long Jiang*, 1998 AMC 854, 856 (S.D.N.Y. 1998) (enforcing a Korean choice of forum clause).

The conflicts that petitioner claims at the appellate level are not conflicts at all, for the simple reason that petitioner has mischaracterized the decision below. The court of appeals did not permit a party to exempt itself from all liability. *Cf.* Pet. at 8, 12. DSR-Senator Lines and Cho Yang both do business in Korea, and there is no reason to think that a claimant would be unable to obtain jurisdiction over them in Korea. Thus cases such as *Knott v. Botany Mills*, 179 U.S. 69 (1900), and *The Kensington*, 183 U.S. 263 (1902), are irrelevant. They are not in conflict with the decision below.

The court of appeals did not invalidate any maritime liens. *Cf.* Pet. at 10, 14. Although petitioner has asserted a maritime lien under U.S. law, no court has yet determined who is in fact responsible for the cargo damage at issue here. If the appropriate court determines that the damage occurred while the cargo was in the custody of

the inland trucker in France, before it was delivered to the ocean carrier, for example, then neither Cho Yang nor DSR-Senator Lines will be responsible for the damage and even under U.S. law petitioner will have no lien. The court of appeals below simply enforced the parties' agreement that the appropriate court to determine these underlying questions would be Korean. Thus cases such as *Krauss Bros. Lumber Co. v. Dimon S.S. Corp.*, 290 U.S. 117 (1933), *The Keokuk*, 76 U.S. 517 (1869), *Dempsey & Associates v. S.S. Sea Star*, 461 F.2d 1009 (CA2 1972), and *Dods Shipping Ltd. v. Karobi Lumber Co.*, 397 F.2d 570 (CA5 1968), are also irrelevant. They, too, are not in conflict with the decision below.

Petitioner has gone far afield in search of a conflict. If it wishes to consider cases that do not directly address whether the unavailability of an *in rem* procedure defeats a bill of lading's forum selection clause, however, the most relevant authority is *Sky Reefer* itself. In that *in rem* action, this Court enforced a forum selection clause calling for arbitration in Tokyo – a forum in which the cargo claimant had no *in rem* rights.

B. ONLY ONE OTHER APPELLATE COURT HAS ADDRESSED THE PROPER SCOPE OF *SKY REEFER*

Not only is there no inter-circuit conflict on the issue presented here, there is not even any tension among the circuits on the proper scope of *Sky Reefer* in general. The Fifth Circuit is the only other court of appeals that has yet

addressed the scope of *Sky Reefer* in a published opinion.[1] In *Mitsui & Co. (USA) Inc. v. Mira M/V*, 111 F.3d 33 (CA5 1997) (per curiam), the court rejected various challenges to the application of *Sky Reefer* and enforced a forum selection clause calling for litigation in England. In *Steel Warehouse Co. v. Abalone Shipping Ltd.*, 141 F.3d 234 (CA5 1998), the Fifth Circuit, citing *Sky Reefer* and its own per curiam in *Mitsui*, enforced a London arbitration clause with two sentences of additional discussion.

Even if this Court were inclined to revisit the question of forum selection clauses in bills of lading, it would be premature to do so now. The lower courts should instead have an opportunity to apply this Court's *Sky Reefer* guidance in a range of situations. If the Court waits to grant plenary review until after the issues have percolated in the lower courts, it would then have the benefit of the experience and wisdom of the judges who face these issues on a more regular basis, and would accordingly be in a better position to formulate more workable rules (if it turns out that any additional rules are needed).

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[1] Other courts of appeals have cited *Sky Reefer* in other contexts as authority for the enforceability of forum selection clauses. *See, e.g., Itel Container Corp. v. M/V Titan Scan*, 139 F.3d 1450, 1454-55 (CA11 1998). None of these cases address the proper scope of *Sky Reefer*.

C. CONGRESS IS CURRENTLY CONSIDERING LEGISLATION THAT WOULD, WITH RESPECT TO FUTURE CASES, RESOLVE THE QUESTION PRESENTED

In *Sky Reefer*, this Court held that section 3(8) of COGSA does not prohibit the enforcement of forum selection clauses, but recognized that Congress could enact a statutory provision banning the enforcement of forum selection clauses – as the legislatures have done in some other countries, including Australia and South Africa. *See* 515 U.S. at 537.

While *Sky Reefer* was pending before this Court, the Maritime Law Association of the United States ("MLA"), which had been instrumental in obtaining the original enactment of COGSA, was coordinating a reexamination of the statute with a view to proposing a package of amendments for Congress's consideration. The principal segments of the industry were represented in the process, and ultimately agreed on a compromise proposal that is now pending before Congress. *See generally* Michael F. Sturley, *Proposed Amendments to the Carriage of Goods by Sea Act*, 18 Hous. J. Int'l L. 609, 616-21 (1996) (describing the process); MLA doc. no. 724, at 2 (May 3, 1996) (resolution recommending the final proposal).

As part of this compromise, in which each side agreed to give up certain advantages in return for other benefits, section 3(8) would be amended to prohibit foreign forum selection clauses in bills of lading governing shipments to or from the United States. *See id.* at 51 (text of proposed amendment); Sturley, *supra*, 18 Hous. J. Int'l L. at 656-59 (explaining this aspect of the proposal).

It appears likely that Congress will enact the proposed amendments soon – perhaps even sooner than this Court could hear and decide the present case. In April, the Surface Transportation and Merchant Marine Subcommittee of the Senate Commerce Committee held hearings on the proposal. The president of the American Institute of Marine Underwriters ("AIMU"), petitioner's supporting *amicus*, was one witness who spoke in favor of the proposal, and he emphasized in particular the proposed amendment to section 3(8). At the end of the hearing, Senator Kay Bailey Hutchison, who chairs the subcommittee, declared, "I would like to pass a [COGSA] reform bill. . . . I think it really is necessary." Tim Sansbury, *Senator Vows Change to Liability Law Covering Cargo Damaged or Lost at Sea*, The Journal of Commerce, Apr. 23, 1998, at 1; *see also, e.g.*, Robert Mottley, *Revised COGSA on Senate Track*, American Shipper, June 1998, at 8-11.

There can be no guarantee, of course, that Congress will ultimately enact this legislation, although it now appears likely. At the very least, Congress is actively considering whether foreign forum selection clauses in bills of lading should be enforceable. This Court should accordingly postpone further consideration of the issue until Congress has had sufficient time to act on it. It would be highly inappropriate to take this statutory issue out of Congress's hands, and unfair to give petitioner and its supporting *amicus* one of their principal benefits under the compromise while ignoring the benefits that carriers such as respondents will receive under the proposed amendments.

II. THE COURT OF APPEALS CORRECTLY CONSTRUED SECTION 3(8) OF THE CARRIAGE OF GOODS BY SEA ACT AND PROPERLY APPLIED THIS COURT'S DECISION IN *SKY REEFER*

For over a quarter-century, starting with *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), this Court has consistently recognized a general rule favoring the enforcement of forum selection clauses. *See also Carnival Cruise Lines v. Shute*, 499 U.S. 585 (1991). Thus it is widely accepted that forum selection clauses such as the one at issue here are enforceable in U.S. courts unless there is a specific ground for non-enforcement, such as fraud or overreaching. *See, e.g., Carnival*, 499 U.S. at 595; *Bremen*, 407 U.S. at 12. Three years ago, in *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995), the Court recognized that this general rule applies in the bill of lading context and that section 3(8) of COGSA does not constitute a ground for non-enforcement. The court of appeals correctly applied these decisions to the specific facts before it.

A. THE *IN REM* PROCEDURE IS A PROCEDURAL REMEDY THAT IS OUTSIDE THE SCOPE OF SECTION 3(8)

Petitioner argues that its *in rem* claim against the ship is a valuable, substantive right, independent of its *in personam* claims against the carriers. *See, e.g.*, Pet. at 9-10. In making this argument, petitioner relies on the popular personification theory, *i.e.*, that "the ship, personified, is itself – or herself – the defendant in a proceeding *in rem* to enforce a lien." GRANT GILMORE & CHARLES L. BLACK, JR.,

THE LAW OF ADMIRALTY 589 (2d ed. 1975). This is, of course, a legal fiction, for the inanimate vessel itself can commit no wrong, and there is no liability under COGSA in the absence of fault, *see* COGSA § 4(2)(q), 46 U.S.C. app. § 1304(2)(q).

Petitioner would use this legal fiction to overrule *Sky Reefer*, but in fact the fiction lacks such power. Professors Gilmore & Black, following an extensive discussion in their leading treatise, summarize the situation as follows:

> It may be concluded that the fiction of ship's personality has never been much more than a literary theme. As such it reached a height of popularity toward the turn of the century. Since then even as literature it has fallen into disrepute, thanks in part to the influence of Holmes and Learned Hand. Fictions serve many useful purposes in the law. Initially their introduction is apt to be a sign of disturbance and growth. But when a fiction has served out its time and purpose, its disappearance, even when it is as agreeable and harmless as the fiction of ship's personality, is always to be welcomed.
>
> . . . Since World War II the courts and commentators have been in comfortable agreement that the personification of the ship is and always has been merely a legal fiction, is not and never has been a principle of decision. Abandonment of the fiction would seem to have been a clear gain for legal thought.

GILMORE & BLACK, *supra*, at 616 (footnotes omitted).

Turning from fiction to reality, the *in rem* procedure is nothing more than a procedural device to enforce (in the context of this case) a cargo owner's claims against a

carrier. Just last Term, the Court implicitly recognized that an *in rem* action against a vessel in the possession of its admitted owner is in reality an action against the owner. *See California v. Deep Sea Research, Inc.*, 118 S. Ct. 1464 (1998). Indeed, this Court recognized well over a century ago that the availability of an *in rem* remedy is only a procedural issue. *See The St. Lawrence*, 66 U.S. (1 Black) 522 (1861) (discussing an *in rem* rule in the 1844 Admiralty Rules). Congress recognizes the issue as procedural, as can be seen from its inclusion in the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. Supp. Rule C. Foreign courts, including the British House of Lords, recognize their own *in rem* rules as a procedural device for bringing an action against the owner of a vessel. *See, e.g., Republic of India v. India Steamship Co.* (No. 2), [1997] 3 W.L.R. 818, 822-29 (H.L.) (U.K.).

Korea may not follow the U.S. *in rem* procedures (because it does not recognize a maritime lien in this context), but other procedures are available under Korean law that enable a cargo owner to bring an action against an ocean carrier for alleged cargo damage. Indeed, petitioner concedes that "Korean law would be at least as favorable as COGSA to [petitioner] in asserting its claims against the carrier in Korea." Pet. at 4. Under section 3(8), the admitted procedural differences are simply irrelevant. *See Sky Reefer*, 515 U.S. at 534-35.

B. THE PETITIONER'S INTERPRETATION OF SECTION 3(8) WOULD EVISCERATE THIS COURT'S DECISION IN *SKY REEFER*

Petitioner claims that this case falls within an exception to the general rule recognized in *Sky Reefer*, *Carnival Cruise Lines*, and *The Bremen*. But if this Court were to recognize the unavailability of an *in rem* procedure and the corresponding nonrecognition of a maritime lien as justifying an exception, this new exception would swallow the general rule. As Professors Gilmore & Black note, "no two maritime countries have the same structure of lien law." GILMORE & BLACK, *supra*, at 788. Even the English theory of maritime liens and *in rem* procedures differs from our own. *See id.* at 589-90, 615-16. In fact, petitioner's *amicus* AIMU describes the action *in rem* as "[a] procedure unique to American admiralty practice." AIMU *Amicus* Brief at 5. Thus no foreign country that could ever be selected as a forum for resolving bill of lading disputes will ever apply exactly the same *in rem* procedures as a U.S. court. In other words, if petitioner were to prevail in this case, foreign forum selection clauses in bills of lading governed by COGSA would once again be unenforceable, the *Indussa* rule that this Court rejected would be resurrected, and *Sky Reefer* would be a dead letter.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

MICHAEL F. STURLEY
Counsel of Record
727 East Dean Keeton Street
Austin, Texas 78705
(512) 232-1350

JAMES J. TAMULSKI
KAYE, ROSE & PARTNERS, LLP
One California Street, Suite 2230
San Francisco, California 94111
(415) 433-6555

WILLIAM M. DUNCAN
216 Hilt Road
Hornbrook, California 96044
(530) 475-0170

Attorneys for Respondents

August 7, 1998